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IN THE

Supreme Court of the United States

October Term, 1958

NO. 457

HORACE INGRAM, L. E. SMITH,
MARY PARKS LAW AND RUFUS JENKINS,

Petitioners

vs.

UNITED STATES OF AMERICA

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF ON BEHALF OF PETITIONERS

WESLEY R. ASINOF
Attorney for Petitioners
419 Atlanta National Bldg.
Atlanta, Georgia

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TABLE OF CASES AND STATUTES CITED

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REFERENCE TO OFFICIAL REPORT

The opinion of the United States Court of Appeals for the Fifth Circuit in this case is officially reported in 259 Federal Reporter, 2nd Series, 886.

JURISDICTION

The jurisdiction of the Supreme Court of the United States is invoked under 28 U.S.C. 1254 (1), and under

and by virtue of Title 18 U.S.C. 3772 and within the time provided for in Rule XI of the Rules of Practice and Procedure, promulgated May 7, 1934 (292 U.S. 661, 666, 54 S. Ct. XXXIX), and Rule 22 (2) of the Supreme Court Rules.

Jurisdiction of this court is invoked because the United States Court of Appeals for the Fifth Circuit has decided an important question of federal law which has not been, but should be, settled by this Court, and has so far departed from the accepted and usual course of judicial proceedings, and so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision, and has misconstrued a decision of this court involving a construction of a statute of the United States, and has, by its ruling, permitted the conviction of a lottery pick-up man and other headquarters personnel to stand on a charge of conspiring to evade and defeat the payment of wagering taxes without evidence of their liability for the payment of such occupational and excise taxes or evidence of their knowledge of its evasion by the principal banker, and has decided a question of gravity and importance in the administration of federal criminal justice involving federal conspiracy trials as it relates to the conviction of persons for conspiracy where such persons can not be legally held accountable for the substantive offense, alleged to have been the object of the conspiracy, and has misconstrued the decisions of this Court in the case of Spies v. United States, 317 U.S. 492, and United States v. Calamero, 354 U.S. 351, all as provided for by rule 19 (1) (b) of the rules of the Supreme Court governing review by this court on certiorari and the grounds therefor.

The judgment of the Court of Appeals was entered on August 27, 1958. A petition for rehearing was denied September 23, 1958. The petition for certiorari was filed and docketed in the Supreme Court of the United States on October 20, 1958, within 30 days after the date of the final judgment of the United States Court of Appeals for the Fifth Circuit denying the petition for rehearing.

STATUTES INVOLVED

26 U.S.C.A. § 4401. IMPOSITION OF TAX

(a) Wagers.—There shall be imposed on wagers, as defined in section 4421, an excise tax equal to 10 percent of the amount thereof.

(b) Amount of wager.—In determining the amount of any wager for the purposes of this subchapter, all charges incident to the placing of such wager shall be included; except that if the taxpayer establishes, in accordance with regulations prescribed by the Secretary or his delegate, that an amount equal to the tax imposed by this subchapter has been collected as a separate charge from the person placing such wager, the amount so collected shall be excluded.

(c) Persons liable for tax.—Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wagers placed with him. Each person who conducts any wagering pool or lottery shall be liable for and shall pay the tax under this subchapter on all wagers placed in such pool or lottery.

26 U.S.C.A. § 4411. IMPOSITION OF TAX

There shall be imposed a special tax of $50.00 per year to be paid by each person who is liable for tax under section 4401 or who is engaged in receiving wagers for or on behalf of any person so liable.

26 U.S.C.A. § 7203. WILLFUL FAILURE TO FILE RETURN, SUPPLY INFORMATION, OR PAY TAX

Any person required under this title to pay any estimated tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015 or section 6016), keep any records, or supply any information, who wilfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the cost of prosecution.

18 U.S.C.A. § 371. CONSPIRACY TO COMMIT OFFENSE OR TO DEFRAUD UNITED STATES

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

THE QUESTIONS PRESENTED

1. The United States Court of Appeals for the Fifth Circuit erred in deciding that where pick-up men or headquarters personnel employed in the operation of a

lottery in violation of state law are exempted by the act of congress from the registrational and taxing provisions of the federal wagering tax act, they can be lawfully convicted in federal court for conspiring with the person liable for the payment of the tax, namely, the banker, to evade and defeat the payment thereof, a felony, where the evidence implicating such pick-up man or headquarters personnel in the alleged conspricay showed nothing more than his act of picking up such lottery tickets and his concealment of his acts from State authorities, and fails to show his knowledge that the alleged banker had not paid the tax due the United States Government.

2. The Court of Appeals erred in deciding and ruling that a conviction in federal court can lawfully stand in such a case where the record in the case is silent and no evidence is offered by the government to prove that the pick-up man or headquarters personnel had knowledge that the banker had not paid the tax due the government.

3. Since this Court held in *United States v. Calamero*, supra, that the tax and reporting requirements of the Federal Wagering Tax Act did not apply to all employees of gambling enterprises, but only to those persons actually "engaged in receiving wagers," and the indictment in this case was drawn and returned by the grand jury prior to such decision by this court, the Court of Appeals erred in holding in effect that the *felony* conviction of such employee for conspiring to evade and defeat the payment of such tax may stand on the same evidence which would have so authorized and demanded his acquittal on the substantive *misdemeanor* offense of failing to register and pay the tax.

4. Does the ruling of this Court in the case of *Spies v.*

United States, 317 U. S. 492, which holds evidence of concealment to be sufficient to raise the offense of failing to pay a tax, a misdemeanor, into the felony of evading and defeating the payment thereof, (substantive offenses), apply to a situation where a person not liable to the payment of a wagering tax may be guilty of a conspiracy to evade and defeat the payment thereof on mere evidence that one or more of the parties to such gambling enterprise concealed some of their activities?

5. The Court of Appeals erred in holding and deciding that where certain parties to a gambling enterprise, such as pick-up men and headquarters personnel, are exempted from taxing and reporting requirements of federal law, they can be lawfully convicted of conspiring to violate such law with their principal without evidence of some ingredient in addition to the wagering contract.

6. The United States Court of Appeals for the Fifth Circuit held in this case as follows:

> "It is a federal offense to engage in accepting wagers without payment of the tax and registering. From the evidence the jury could have found and apparently did find that the appellants were engaged in the mutual activity of operating a lottery with a common purpose of escaping detection, prosecution and punishment. So also the jury could have found and apparently did find that the activities were carried out with the further purpose of evading and defeating the Federal Statutes requiring payment of the tax and registering."

The Court of Appeals, in so holding and deciding, erred in that there was no evidence in the record to show any such purpose on the part of the petitioners to evade

and defeat the federal statutes requiring payment of the tax and registration.

7. The United States Court of Appeals for the Fifth Circuit, in holding and deciding that the evidence in the case was sufficient to show a conspiracy on the part of the petitioners to evade and defeat the payment of federal taxes inasmuch as the evidence showed appellants were engaged in the mutual activity of operating a lottery with a common purpose of escaping detection, prosecution and punishment, overlooked and misconstrued the controlling principle of the ruling of the Supreme Court in the case of *United States v. Calamero*, 354 U. S. 351, holding as follows:

> "We can give no weight to the Government's suggestion that holding the pick-up man to be not subject to this tax will defeat the policy of the statute because its enactment was 'in part motivated by a congressional desire to suppress wagering.' The statute was passed, and its constitutionality was upheld, as a revenue measure, United States v. Kahriger, 345 U. S. 22, and, apart from all else, in construing it we would not be justified in resorting to collateral motives or effects which, standing apart from the federal taxing power, might place the constitutionality of the statute in doubt."

The Court of Appeals overlooked the controlling principle of this case, to-wit: That the appellants, in acting as employees of the banker in the operation of the lottery, were exempt from the taxing and registrational provisions of the Federal Wagering Tax Act, and, the evidence being silent as to knowledge by such employee of the failure of the banker to pay his federal tax, the mere act of the employee in picking up lottery tickets or checking them at a headquarters would not tend to prove the conspiracy to evade and defeat payment.

8. The United States Court of Appeals for the Fifth Circuit erred in applying and extending the principle of law held by this Court in the case of *Spies v. United States,* 317 U. S. 492, in that the holding of this Court in the Spies case, supra, is completely inapplicable to the facts and the law in the case at bar.

The Spies case, supra, was a prosecution for the *substantive* offense of the felony for the attempt to evade and defeat the payment of federal tax. The real issue before the Court was the distinction between such felony charge and that of the willful failure to pay the tax. In pointing out the distinguishing elements of the greater from the lesser offense this Court held that

> "Willful but passive neglect of the statutory duty may constitute the lesser offense,"

but that in order to raise the lesser offense to the degree of the named felony

> "Congress intended some willful commission *in addition* to the willful omissions that make up the list of misdemeanors." (Italics added.)

This Court then further defined the felony to have been made out by showing the commission of the misdemeanor and to

> "combine with it a willful and positive attempt to evade tax in any manner or to defeat it by any means lifts the offense to the degree of felony."

The Court of Appeals erroneously misapplied the principle of the Spies case to the facts of the case at bar by holding the concealment to be proof of the conspiracy charge against defendants who otherwise would have violated no federal law, either substantive or conspiratorial, whereas the only legitimate use of the evidence of con-

cealment, according to the Spies case, would have been to have raised a *substantive* misdemeanor to a *substantive* felony. A further fallacy of the holding of the Court of Appeals is that the evidence of concealment in the Spies case was used *in addition to and in aggravation of* the already made out misdemeanor case, whereas in the case at bar evidence of concealment was used *to make out* a felony conspiracy where no misdemeanor existed prior thereto, either substantive or conspiratorial.

9. The United States Court of Appeals for the Fifth Circuit erroneously broadened and extended the magnitude of conspiracy prosecutions by:

(a) Overlooking the law that operation of a lottery is not a violation of federal law, and that conspiring to operate a lottery is not a violation of federal law, but that in order to fasten federal liability upon one alleged to have been a member of a conspiracy such as that charged in the indictment in the case at bar it would have been necessary that the Government prove such defendant to have entered into an agreement to evade and defeat the payment of the federal tax due; not that they were merely banded together for the purpose of operating a lottery.

(b) Recognizing that acts of concealment of the lottery activities by some of the members of the group charged with the offense to amount to sufficient proof that the entire group have done so for the purpose of one of them (the banker) to evade and defeat the payment of the federal wagering taxes due.

(c) Overlooking the principle of law that proof of concealment by those alleged to have been members of the conspiracy is not, and cannot, be proof of the fact of

the unlawful agreement *unless the concealment is alleged and shown by the evidence to have been one of the objects of the conspiracy*, and that the participants *agreed to conceal* their activities in order to further the conspiracy.

(d) Overlooking the law that the gist of conspiracy to evade and defeat the payment of federal tax on wagers is the *agreement to evade the tax;* not the agreement to operate a lottery in violation of the law of the State, and that a conviction for the offense charged is not supported by the evidence where the evidence fails to show by any competent proof that the alleged conspirators, or some of them, *knew* that the person liable for the payment of the tax, the banker, had willfully attempted to evade the payment thereof by some affirmative act or acts.

10. The United States Court of Appeals for the Fifth Circuit overlooked and misconstrued the controlling principle of law enunciated by this Court in the Grunewald case, 353 U. S. 391, to the effect that acts of concealment by the conspirators, where not shown by the evidence to have been one of the objects of the original conspiracy, do not become a part thereof so as to continue the life of the conspiracy, or to give life to one that never did, in fact, really live.

11. The United States Court of Appeals for the Fifth Circuit in effect ruled erroneously that the operation of a lottery in violation of State law was a violation of federal law so long as the federal tax was not paid, and erroneously ruled that the Government did not have to prove that the federal tax had not been paid. Petitioners respectfully submit that this is an erroneous interpretation of the law, and that just the opposite is true, to-wit: that the operation of a lottery is not a violation of the

federal law but that if one is operated a tax must be paid to the government, and that if such tax is not paid the gist of the offense is the failure to pay the tax; not the operation of the lottery. Consequently, the gist of the offense of conspiracy to violate this same federal law is the *unlawful agreement to evade and defeat the payment of the tax*. In other words, it would not be necessary for the government to prove that all the conspirators were in the lottery enterprise as a prerequisite to a conviction for conspiracy; it would only be necessary for the government to prove that the conspirators agreed to attempt to evade and defeat the payment of the wagering taxes owed by another person who was in the lottery enterprise as a banker or writer.

STATEMENT OF THE CASE

Petitioners were indicted by the United States Grand Jury for the Northern District of Georgia, along with other persons (31 defendants) on a three count indictment. Count one charged a conspiracy between the named defendants and other persons to unlawfully, willfully and knowingly attempt to evade and defeat the taxes imposed by Sections 4401 and 4411, Title 26, U.S.C. and to attempt to evade and defeat the payment thereof, (wagering taxes). Count two charged petitioners and others with engaging in the business of accepting wagers and conducting a lottery for a profit without paying the special tax. Count three charged petitioners and others with engaging in the business of accepting wagers and conducting a lottery for a profit without registering.

Petitioners and 22 other defendants were placed on trial before a jury, a severance having been granted to three of the defendants, John Elmer Ingram, Charles

Harold Echols and Hill Tallent. One of the defendants, Sanchez McDowell, remained a fugitive, and another, Clarence Walker, was dismissed from the indictment on motion of the government at the commencement of the trial.

The evidence on behalf of the government centered around a garage located at 1492 Howell Mill Road, in Atlanta, Georgia. On March 27, 1957, a number of federal agents from the Intelligence Division of the Treasury Department accompanied by investigators from the office of the Solicitor of the Criminal Court of Fulton County raided this garage, known as Ingram's Garage. Five of the alleged conspirators were present at the time of the raid and a sixth, Rufus Jenkins, came upon the scene later. In the garage the agents found numerous items consisting of scratch pads, paper sacks, card tables, police radios and other items contended by the government to be paraphernalia used in the operation of a lottery.

On September 20, 1956, about six months prior to the raid on Ingram's Garage, petitioner L. E. Smith, defendant Eugene Thomas and petitioner Mary Parks Law were arrested at a residence located in Forsyth County, Georgia, in company with defendants John Elmer Ingram and Charles Harold Echols who were not being tried at this time, and all were charged with the State offense of operating a lottery known as the numbers game. All those persons later plead guilty to the charge in the State court and were fined.

Horace Ingram, one of the petitioners, had on several occasions given sums of money to police officers of the City of Atlanta who were also indicted and tried as

alleged co-conspirators in the case. All eight police officer defendants who were tried, J. W. Ellington, Paul Frank Bennett, Gene Paul Hicks, Clyde Edwin Carter, George H. Wade, George W. Slate, Roy H. Flemming and Foster Ellington were acquitted; seven of them by the jury and the other, J. W. Ellington, by judgment of acquittal by the court at the conclusion of the evidence in the case.

Some of the defendants on trial, Richard Lee Turner, John Hill, Jr., Will Smith and Tommy Reid were what are known as "pick-up men" in the lottery. The court, at the conclusion of the evidence, granted judgments of acquittal as to all four of these defendants on substantive counts two and three. Two of these defendants, Tommy Reid and Will Smith, were acquitted by the jury on the remaining conspiracy count.

John Elmer Ingram, one of the defendants who had been granted a severance, on or about the month of August, 1956, had accepted some wagers from a witness by the name of Rutherford. This witness testified he did not know to whom John Ingram was turning in these wagers or who the actual "banker" was.

Petitioner Horace Ingram had, on one occasion, threatened two City of Atlanta police officers, R. M. Clarke and R. T. Appling, by telling them to leave him alone or he would have them moved off his beat and made admissions to these officers pertaining to his being in the lottery business.

At the conclusion of the evidence in chief on behalf of the government, the government moved for a judgment of acquittal as to defendants Hollis, Gresham, Freeman and Williams, and the court granted these motions.

Motions for judgments of acquittal were made on behalf of all the defendants at the conclusion of the evidence for the government and renewed at the close of all the evidence. With the exception of the motions heretofore stated to have been granted the motions were overruled by the court.

The United States Court of Appeals for the Fifth Circuit, in affirming the conviction for conspiracy, ruled that "None of the appellants had paid a wagering tax or registered as the statute required, nor had any of the others connected with the enterprise done so." The Court of Appeals further held that "All of them, (appellants), however, were identified with and active in the carrying on of the numbers game."

"The pick-up men and the headquarters personnel, if neither bankers nor writers, are not liable for the tax and are not required to register." The Court of Appeals then held that "With a factual situation such as the evidence here discloses, it will not be presumed nor was the Government required to prove that the tax which was payable had not been paid."

A petition for rehearing was filed by petitioners, and denied by the United States Court of Appeals.

The Supreme Court of the United States granted certiorari.

SUMMARY OF ARGUMENT

1.

Petitioners were engaged in operating a lottery and concealed their activity. The Government failed to prove that the petitioners not liable for the payment of the

tax had knowledge that the person liable had failed to pay. Employees of a lottery principal or banker are not required to register or pay federal tax, and, as to them, they violate no federal law. The operation of a lottery is a violation of the Georgia State law, and those who engage in it are not in violation of federal law unless they conspire with person liable for tax to evade and defeat its payment. Concealment of lottery activity is an essential precaution to the successful existence of the State violation; hence it can not be inferred that concealment was for purpose of evading federal tax. The evidence in this case would have demanded the acquittal of all defendants except the banker on the substantive misdemeanor charge, therefore their acts of concealment do not authorize their conviction of the felony conspiracy.

2.

The ruling of this Court in the case of Spies v. United States, 317 U.S. 492, is not applicable to the facts of this case. The Spies case, supra, was a prosecution for the substantive offense and evidence of concealment was offered by the Government in that case to raise the offense from the misdemeanor of failing to pay the tax to the felony of evading and defeating its payment.

3.

The gist of the conspiracy in this case is the agreement to violate the Wagering Tax Act. Inasmuch as the agreement to wager is a necessary element of the Government's proof on a substantive charge of failing to pay the tax and this court, in United States v. Calamero, 354 U.S. 351, has held that employees of the banker are not required to pay the tax, there can be no conviction for

the conspiracy thereof without proof of some additional ingredient in addition to the wagering contract.

4.

The evidence that petitioners operated a lottery "with a common purpose of escaping detection, prosecution and punishment," as held by the Court of Appeals, was not sufficient to show they attempted to avoid federal authorities by such acts of concealment. Employees not subject to federal tax would have no motive to escape detection from federal authorities because they can not be prosecuted by them for operating such lottery without payment of the federal tax. Concealment of their activity from State authorities is necessary inasmuch as it is a violation of State law. If the federal tax had been paid and no conspiracy entered into by them to evade and defeat payment of the tax, concealment of their activity would have been just as essential as if the tax had not been paid.

5.

The acts of concealment have not been shown to have been one of the objects of the original conspiracy, but merely subsidiary thereto, the proof of which fails to illustrate or prove the main conspiracy. A subsidiary conspiracy to conceal is inherent in every crime requiring concert of action; therefore the concealment in this case fails to prove that the main conspiracy ever existed.

6.

The opinion of the Court of Appeals holding the Government is not required to prove that the tax has not been paid is error. The holding is inconsistent with the second portion of the opinion holding that the charge is

not the carrying on of a lottery, but a conspiracy to evade and defeat payment of tax. The two theories of the Court of Appeals are inconsistent and incompatible.

ARGUMENT

PART I.

CONCEALMENT NOT SUFFICIENT TO PROVE CONSPIRACY WHERE KNOWLEDGE NOT SHOWN.

The evidence in this case for the Government, although voluminous, is confined to proving that all the petitioners were engaged, in one capacity or another, in the operation of a lottery and that in carrying out the operation each of the petitioners had concealed their individual activities in order to escape detection, prosecution and punishment.

The petitioners contend that concealment of their activity was employed by them for the purpose of avoiding detection, prosecution and punishment by the authorities of the State of Georgia for the State charge of operating, or assisting in the operation of, a lottery. The Government contends that the petitioners concealed their activity in order to avoid "detection by persons other than the local police." (p. 13, brief of U.S.) The Court of Appeals ruled that "the jury could have found and apparently did find that the appellants were engaged in the mutual activity of operating a lottery with a common purpose of escaping detection; prosecution and punishment."

No contention is made by the Government, and no evidence was offered to prove, that any effort was made by any of the petitioners to conceal assets. No evidence was offered by the Government disclosing any agreement

between the petitioners to evade and defeat the payment of the federal taxes. No evidence was offered by the Government to prove that those petitioners not liable for the payment of such federal taxes had knowledge that the "banker" had not paid them.

"Pick-up men," messengers or "headquarters" personnel are exempted by law from the tax provisions of the Federal Wagering Tax Act.

United States v. Calamero, 354 U.S. 351.

Obviously the petitioners who come within the category just stated were not engaged in an *unlawful* act under federal law, and as to petitioner Ingram, the banker, the operation of the lottery by him was lawful under federal law although subject to the payment of occupation and excise tax.

The Government apparently concedes and the United States Court of Appeals for the Fifth Circuit tacitly held the concealment of the lottery operation by the various defendants was all the evidence the jury had to consider to authorize an inference that the defendants had conspired to evade and defeat the payment of the federal tax. This trial lasted 19 days, and the transcript consumes more than 3300 pages, yet only a few minutes were spent by the Government in proving the most vital issue of all, that the federal tax had not been paid. The Government never did show that any of the defendants were liable for the tax except petitioner Ingram.

In the case at bar the petitioners are all concededly guilty of violating the laws of Georgia pertaining to the operation of a lottery, a misdemeanor, as provided by

Georgia Code of 1933, Title 26-6502,

whereas the operation of a lottery is not a crime under federal law, but the taxing

"statute was passed, and its constitutionality was upheld, as a revenue measure."

United States v. Calamero, 77 S. Ct. 1138, (354 U.S. 351)

The federal courts must approach this case on the premise that persons engaged in the operation of a lottery in any capacity are violating no federal law in so doing. Those persons who do choose to engage in such occupation, however, are faced with the danger of punishment by the local authorities if detected and prosecuted. Insofar as federal authorities are concerned the bankers of the lottery need only pay the tax imposed upon them by Congress to stay within the federal law. As to the employees of the banker, they owe no federal tax, and they can not be held accountable for the failure of their employer to pay the tax which he may owe. It is only in those instances where such employees assist the banker or conspire with him *to evade the payment* of such federal tax that they violate any federal law.

The Court recognized in

United States v. Kahriger, 345 U.S. 22, (73 S. Ct. 510),

by a close majority, that the Wagering Tax Act did not offend the Constitution even though gambling in most States was recognized to be illegal.

Conceding the operation of a lottery, or the aiding and abetting of one, to be in violation of the criminal laws of the State of Georgia, as defined by Georgia Code 26-6502, concealment of lottery activities by those engaged in such unlawful pursuit, either in pursuance of a conspiracy under State law to operate, or individually, is a necessary and an essential precaution to the successful existence of the State violation whether the federal

tax imposed on such wagers be actually paid or not. Therefore concealment of the State lottery violation would not be relevant to prove knowledge of the failure to pay the tax inasmuch as the payment of the tax would not have eliminated concealment as a necessary factor to successfully avoid detection, prosecution and punishment for violating the State law.

The relevant question, therefore, is what logical inferences may be legitimately drawn from such evidence of concealment. Is it reasonable or logical that evidence of concealment of lottery activity authorizes an inference of participation in the operation of the lottery itself, which participation would subject the party concealing to arrest, prosecution and punishment by local authorities, or may evidence of such concealment authorize the inference that the party concealing *knew that the tax*, owed by another person, *had not been paid?* Such latter inferences, if they could be said to exist, would be objectionable on another ground, to-wit: that the hypothesis, being circumstantial, would be insufficient to exclude every other reasonable hypothesis, that is to say, that concealment was for the purpose of evading detection, prosecution and punishment by the local authorities.

Concealment of crime, along with evidence of flight, escape or resistance, is admissible as "indicative of a consciousness of guilt."

Wigmore on Evidence, 3rd Ed. #276.

So, concealment of lottery activity may authorize an inference of guilt; but the only guilt inferred would be that of the offense of operating the lottery and not that of the evasion of a tax imposed upon another person.

The evidence in this case clearly shows that the operation of the lottery required concert of action, and the

actions of the various agents, such as pick-up men and headquarters employees, under the Calamero case, supra, were lawful and would have demanded their acquittal on a substantive misdemeanor charge. Whether the tax had or had not been paid by their principal would not have caused them to do other than what they did, to-wit: *conceal their lottery activity*. Therefore, their acts of concealment fail to illustrate their knowledge or agreement to evade the payment of the tax.

PART II.

SPIES CASE NOT IN POINT

The United States Court of Appeals for the Fifth Circuit, in finding the evidence of concealment sufficient to authorize an adjudication that petitioners had conspired to evade and defeat the payment of federal wagering taxes owed by the banker, Ingram, relied heavily upon the case of

Spies v. United States, 317 U.S. 492;

on the theory that the *motive* for concealment was a question to be determined by the jury. This was erroneous.

The Spies case, supra, was a prosecution for the substantive offense of attempting to evade and defeat the payment of income tax. Spies admitted at the opening of his trial that he had sufficient income to place him under a duty to file a return and to pay a tax but that he did neither. The entire trial was devoted mainly toward the government's attempt to prove that Spies offense was that of the felony of attempting to willfully evade and defeat the payment of the tax. Evidence of concealment on the part of Spies was offered by the government to

raise the *admitted misdemeanor* of failing to pay the tax to the felony of evading and defeating its payment. On that point, this Court held:

> "If the tax evasion motive plays any part in such conduct the offense may be made out even though the conduct may also serve other purposes such as concealment of other crime."

The Spies case is clearly distinguishable from the case at bar. Spies was a substantive charge; Ingram is a conspiracy. Spies admitted sufficient facts to authorize his conviction for the misdemeanor; the petitioners in the Ingram case are admittedly not guilty of any federal misdemeanor, substantive or otherwise. In Spies the concealment consisted of items directly relating to records dealing with income; in Ingram the concealment was of items connected altogether with the lottery venture. In Spies the evidence of concealment was circumstantial proof of the fact of evasion of the substantive offense; in Ingram the evidence of concealment fails to prove the conspiracy charged in the indictment.

PART III.

CONVICTION FOR CONSPIRACY UNWARRANTED WHERE NO INGREDIENT IN ADDITION TO THE WAGERING CONTRACT INVOLVED

This gist of the conspiracy in this case is the agreement to violate the Wagering Tax Act. In order to fasten liability upon any person for this tax a wagering agreement must be entered into between a bettor and a banker. The Act contemplates more than one person be involved. However, Congress has seen fit to impose no tax liability upon any person in this enterprise other

than the banker and a writer employed by him. The bettor or player, the pickup man and the other various and sundry employees of the banker or writer are all exempted, by the Act of Congress, from paying tax. In such cases as these, there can be no conviction for a conspiracy merely to enter into an agreement to operate a lottery unless there is another ingredient in addition to the wagering contract, for the criminality of the operation of a lottery in such case must stand or fall on whether the law imposes a penalty for such substantive act. In other words a conspiracy case can not be made out against one who could receive no penalty for the substantive offense, unless an additional ingredient is also present.

It must be borne in mind that a distinction must be made between crimes that may be committed by an individual singly, and crimes which, by their very nature, require concert of action or concurrence between two or more persons. Crimes such as manufacturing liquor, murder, arson, burglary, rape, larcency, or transportation of stolen vehicles in interstate commerce come within the former category, while offenses such as adultery, fornication, transportation of a female in interstate commerce for purposes of prostitution (with the female's consent), or selling liquor are all offenses necessarily falling within the latter category. This is necessarily true because where concert is necessary to accomplish a substantive offense, conspiracy does not lie without an additional ingredient.

U.S. v. Sager, 49 Fed. 2nd, 725.

The conspiracy is the unlawful agreement "to commit any offense against the United States,"

18 U.S.C.A. #371,

therefore where the substantive offense, the commission of which is the object of the conspiracy, is such type of offense that necessarily requires concert of action, or an unlawful agreement itself, the conspiratorial agreement is a necessary part of, and must of necessity merge in, the substantive offense.

United States v. Katz, 271 U.S. 354,
(46 S. Ct. 513).

Where Congress manifests an intention to leave certain persons unpunished, even though necessary parties to the commission of an offense itself, or to exempt certain individuals from the tax provisions of its laws, this must be taken to be

"evidence of an affirmative legislative policy,"
Gebardi v. United States, 287 U.S. 112,
(53 S. Ct. 35),

that they be not prosecuted for conspiring to violate such substantive offense.

The Gebardi case, supra, holds that on a charge of conspiring to violate the Mann Act the woman transported can not be convicted of the substantive offense and, therefore, can not be lawfully convicted of the conspiracy to transport herself. This Court held:

> "We perceive in the failure of the Mann Act to condemn the woman's participation in those transportations which are effected with her mere consent, evidence of an affirmative legislative policy to leave her acquiescence unpunished. We think it a necessary implication of that policy that when the Mann Act and the conspiracy statute came to be construed together, as they necessarily would be, the same participation which the former contemplates as an inseparable incident of all cases in which the

> woman is a voluntary agent at all, but does not punish, was not automatically to be made punishable under the latter. It would contravene that policy to hold that the very passage of the Mann Act effected a withdrawal by the conspiracy statute of that immunity which the Mann Act itself confers."

15 Corpus Juris Secundum, 1073, states the rule as follows:

> "An agreement to commit a crime is not indictable as a conspiracy where a concert and plurality of agents are necessary elements of the substantive offense for the commission of which a conspiracy is alleged to have been formed."

The case at bar falls within the same rules. The operation of a lottery necessarily requires the concert of many players and a banker, and the concurrence of many agents as pickup men or headquarters personnel. Congress has not seen fit to impose any penalty upon those persons who are not bankers nor writers, nor has Congress any desire to impose upon them a tax for carrying on such pursuit. Therefore, it would contravene such legislative policy to hold that the passage of the Wagering Tax Act "effected a withdrawal by the conspiracy statute of that immunity which the (Wagering Tax Act) itself confers." Gebardi v. U.S., supra.

The Wagering Tax Act, (26 U.S.C.A. #4401) imposes an excise tax of 10% on wagers. This tax is payable by the proprietor, sometimes called the "banker," of the wagering enterprise. The Act (26 U.S.C.A. #4411) also imposes a special tax of $50.00 per year to be paid by each person who is liable for tax under section 4401 "or who is engaged in receiving wagers for or on behalf of any person so liable." No penalty is imposed by the Act of Congress for *operating* the lottery. The only penalty

provided by the Act is set forth in 26 U.S.C.A. #7203. This section makes it a misdemeanor to willfully fail to pay such tax or file a return. The Act is strictly a revenue measure.

United States v. Kahriger, supra.

Those persons employed in any capacity other than as a banker or writer are not required to pay the taxes imposed by the chapter.

United States v. Calamero, supra.

It must be presumed that Congress, in enacting this legislation, intended to impose no tax upon those other than the bankers or writers, and that the misdemeanor provisions of the Act applied only to such persons required to file the return or to those who are liable for the payment of the taxes.

The agreement to receive a wager is an element which must of necessity be present to the existence of the fundamental basis of tax liability under the Wagering Tax Act. Agents and employees of the proprietor or "banker" are also essential to the pursuit of the occupation which becomes the foundation of the power of the government to tax. Congress has, therefore, in failing to impose a tax on the employee, impliedly excluded him from tax liability and has granted him immunity from the misdemeanor provisions of the Act for failing to pay the tax or failing to file a return.

The Government now seeks to use this same wagering contract, (to which Congress has seen fit to impose no tax liability), as a basis of a conviction under the conspiracy statute.

Can the Government argue with any logical force that the same wagering contract that is deemed by Congress

to be lawful in its substantive application can be the sole basis and foundation of a conviction when viewed from its conspiratorial aspect? Can that agreement to which Congress has given its stamp of approval when clothed in a substantive charge be held unlawful when wearing the garment of a conspiracy indictment? The answer must be in the negative.

Concert of action between the banker and bettors and a plurality of agents to carry out the operation are all indispensable elements of the substantive offense.

See: United States v. Dietrich, (126 Fed. 664.)

The misdemeanor offense of failing to pay the special occupational or excise tax or the felony offense of attempting to evade and defeat payment of the tax may only be committed by the principal banker, and the misdemeanor offense of failing to pay the special occupational tax or the felony of attempting to evade and defeat payment thereof may only be committed by the writer. However, his or their liability respectively must rest upon the pre-existence of a lottery or other wagering scheme or device. Such wagering device is a prerequisite to the tax liability and therefore an essential element of the offense charged. Since such lottery device requires concert of action by all its agents, there can be no conviction for conspiracy to commit the offense of failing to pay the tax or evasion unless the proof shows some ingredient in addition to the wagering scheme by which all the agents necessarily concur.

See; United States v. Burke, 221 Fed. 1014;

Vannatta v. United States, 289 Fed. 424;

Chadwick v. United States, 141 Fed. 225.

PART IV.

NO EVIDENCE THAT CONCEALMENT WAS TO ESCAPE DETECTION, PROSECUTION AND PUNISHMENT BY FEDERAL AUTHORITIES

The United States Court of Appeals for the Fifth Circuit's ruling that petitioners operated a lottery "with a common purpose of escaping detection, prosecution and punishment," and the Government's argument that the employee's concealment was for the purpose of avoiding "detection by persons other than the local police," are unfounded in both reason and logic.

Inasmuch as the employees of a lottery operation, who are neither bankers nor writers, are not subject to payment of either excise or occupational tax, they would not be subject to prosecution and punishment by federal authorities for engaging in such occupation in that respective capacity although they conducted themselves in an open and notorious manner; consequently no valid reason would appear for them to conceal such lottery activities from federal authorities in order to "avoid detection, prosecution and punishment." Why should they seek to *"avoid detection"* by a Government whose laws have not been violated by them or whose taxing power does not embrace them? Why should they conceal their activity from a Government to avoid *"prosecution,"* when that Government's laws do not prohibit the activity being concealed? Why should they hide from a Government in order to escape *"punishment,"* when that Government is without lawfully constituted power to inflict punishment on those not found violating its laws? How could it be logically held their concealment was for any purpose of avoiding detection, prosecution, or punish-

ment by persons other than the local police? That their concealment was for the purpose of "avoiding detection, prosecution and punishment" is readily admitted by the petitioners; detection, prosecution and punishment by the local authorities, however, and not the federal government. These employees had nothing to fear from the federal authorities; they owed no tax. They did have something to fear from the local authorities; detection, prosecution and punishment for violating Georgia Code 26-6502 relating to the operation of a lottery, or the aiding and abetting thereof.

Had the tax due the United States been paid or had the Wagering Tax Act been repealed would the concealment of the lottery operations have been any the less necessary, or would the same concealment have been an unnecessary factor prior to the enactment of the Wagering Tax Act of 1951? The answer must emphatically be *NO*. Therefore concealment to avoid detection, prosecution and punishment is not an element of any conspiracy to evade payment, nor is it a circumstance sufficient to authorize a conviction of the crime of conspiring to defraud the Government.

The Government's contention here is almost identical with its position in

Krulewitch v. United States, 336 U.S. 440,
(69 S. Ct. 716,)
Lutwak v. United States, 344 U.S. 604,
(73 S. Ct. 481,)
and
Grunewald v. United States, 353 U.S. 391,
(77 S. Ct. 963,)

where it was urged that

> "Conspirators about to commit crimes always expressly or implicitly agree to collaborate with each

other to conceal facts in order to prevent detection, conviction and punishment."

This Court rejected the Government's contention in all those cases by holding in Krulewitch, supra, and Lutwak, supra, that the declaration of a conspirator made after the central aim of the alleged conspiracy had ended was inadmissible and hearsay because not made in furtherance of the alleged criminal transportation conspiracy charged,

> "but made in furtherance of an alleged implied but uncharged conspiracy aimed at preventing detection and punishment,"

and by holding in Grunewald, supra, that prosecution was barred by the statute of limitations and that evidence of concealment long after the original conspiracy had ended would not be admissible to keep the original conspiracy alive. It was there held:

> "A subsidiary conspiracy to conceal may not be implied from circumstantial evidence showing merely that the conspiracy was kept a secret and that the conspirators took care to cover up their crime in order to escape detection and punishment."

PART V.

CONCEALMENT NOT SHOWN TO HAVE BEEN ONE OF THE OBJECTS OF THE ORIGINAL CONSPIRACY

The doctrine of Krulewitch, supra, and Grunewald, supra, is that the law recognizes two different types of conspiracies. The first can be termed the main conspiracy; the second can be termed a subsidiary conspiracy. A conspiracy to conceal can belong to either group. If the object of the main conspiracy, that is to say the commission of the unlawful act itself, embraces

concealment as a necessary element of the substantive offense itself, or as a necessary ingredient thereof, then those acts of concealment can be said to relate to, and be objects of, the main conspiracy. However, if the acts of concealment, or the conspiracy to conceal, have for their object the purpose of avoiding detection or covering up the main conspiracy or the offense which was the object thereof, then such acts of concealment, or the conspiracy to commit them, constitute no more than a *subsidiary* conspiracy to conceal.

These rules should logically follow as an extension of Krulewitch, supra, and Grunewald, supra, without respect to the element of time. Such extension would tend to restrict the ever broad sweeping scope of federal conspiracy prosecutions by confining the prosecution to overt acts tending to prove the main conspiracy itself, rather than to permit it to roam into prejudicial and subsidiary conspiracies so remote to the main conspiracy as to create confusion and prejudice the rights of the defendants on trial as was done in the case at bar.

For example, a conspiracy to steal may embrace within its scope a conspiracy to conceal the article stolen by changing its appearance in order that the true owner might be more effectively deprived of its possession. Such a conspiracy to conceal could be termed a part of the main conspiracy because it has, as its object, one of the elements of the substantive offense itself. On the other hand, a conspiracy to steal may also embrace within its scope a conspiracy whereby the conspirators may avoid detection, prosecution and punishment. Such would be termed subsidiary because implied inherently in every conspiracy. Such subsidiary conspiracy to conceal is inherent in any conspiracy, whether expressed

or implied. However, the proof of such subsidiary conspiracy to conceal certainly should not be held to be sufficient in itself to authorize a conviction for the main conspiracy when the evidence fails to support the proof of such main conspiracy.

In Grunewald, supra, the government argued the analogy in the crime of kidnapping. The government contended that acts of conspirators in hiding while waiting for ransom would be planned acts of concealment in aid of such conspiracy to kidnap. This Court, in holding the analogy to be invalid, ruled:

> "Kidnappers in hiding, waiting for ransom, commit acts of concealment in furtherance of the objectives of the conspiracy itself, just as repainting a stolen car would be in furtherance of a conspiracy to steal; in both cases the successful accomplishment of the crime necessitates concealment. More closely analogous to our case would be conspiring kidnappers who cover their traces after the main conspiracy is finally ended—i.e., after they have abandoned the kidnapped person and then take care to escape detection. In the latter case, as here, the acts of covering up can by themselves indicate nothing more than that the conspirators do not wish to be apprehended – a concomitant, certainly, of every crime since Cain attempted to conceal the murder of Abel from the Lord."

The crucial teaching of Grunewald, Krulewitch and Lutwak, supra, is that acts of concealment for the purpose of avoiding detection, prosecution and punishment are inherent in every conspiracy and therefore not sufficient to breathe life into a conspiracy which has lived and died, nor keep a conspiracy alive after it has run its course of time. In those cases the Government proved

the existence of the main conspiracy, the only purpose of proving the acts of concealment being to extend the crime for an indefinite time past the ordinary statute of limitation. This, the Court said, could not be done.

If, in those cases, evidence of concealment was not relevant to keep life in a dying conspiracy, or to give life back to one that had previously lived, then it cannot give birth to one that never existed.

If proof of concealment in the case at bar is sufficient to prove the main conspiracy charged, then evidence of concealment in the Grunewald, Krulewitch and Lutwak cases, supra, would have been admissible to extend the life of one that was dead. The one must follow the other, as the night the day.

PART VI.

COURT OF APPEALS ERRED IN HOLDING THAT GOVERNMENT NOT REQUIRED TO PROVE FEDERAL TAX NOT PAID AND THAT OPERATION OF LOTTERY IS VIOLATION OF FEDERAL LAW

The United States Court of Appeals for the Fifth Circuit's opinion in this case affirming the District Court is inconsistent and ambiguous. In the first portion of the opinion, on the question as to whether the evidence was sufficient to show the appellants had knowledge of the banker's failure to pay the tax, the Court held:

> "With a factual situation such as the evidence here discloses, it will not be presumed nor was the Government required to prove that the tax which was payable had not been paid."

The Court of Appeals here ruled in effect that questions as to the payment or non-payment of the federal tax was not involved, but that the all-important fact of conspiracy

was to be determined from the evidence that the appellants had banded together for the purpose of operating a lottery and that concealment of their activity authorized the inference of a federal conspiracy to evade and defeat the payment of federal tax, and that whether the substantive violation of the failure to pay the tax was later accomplished or not was not to be considered as material to the fact of the conspiracy to effect such an object.

The Court of Appeals then completely reversed its position on the question whether a conspiracy can exist against one who could receive no penalty for the substantive offense unless an additional ingredient is present. The Court of Appeals, on this point, held:

> "If this were a case where one who had purchased a lottery ticket was contending that he could not be convicted of being a conspirator the argument might be persuasive. It is not such a case. The charge is not that of carrying on a lottery. It is of a conspiracy to evade and defeat the payment of the wagering tax."

Thus the first portion of the opinion recognizes the operation of the lottery and its concealment as the all-important criteria necessary to determine guilt, whereas the last portion of the opinion places the charge of carrying on a lottery as immaterial and recognizes for the first time that the real question at issue was the conspiracy to evade and defeat the payment of the wagering tax.

In

United States v. Biggs, 211 U.S. 507,
(29 S. Ct. 181,)

this Court held on the construction of a conspiracy indictment:

> "Having thus decided that the indictment as construed charged the doing of no unlawful act, but simply the exercise of lawful act, not in any way prohibited, but, on the contrary, impliedly sanctioned by the statute, it was decided that, under no possible construction, could the acts charged constitute an unlawful conspiracy * * * "

This rule is applicable in the case at bar. The evidence shows the commission of no unlawful act insofar as it concerns the federal government, but "simply the exercise of a lawful act, not in any way prohibited, but, on the contrary, impliedly sanctioned by the statute." Consequently "under no possible construction, could the acts charged constitute an unlawful conspiracy."

CONCLUSION

The concealment of lottery activity by the petitioners was necessary to avoid detection by the authorities of the State, and it was not shown that it was for the purpose of evading the payment of any federal tax. The evidence on behalf of the government failed to show knowledge by any of the petitioners that persons liable to the government for the payment of tax had failed to pay the tax or make a return. The concealment was not shown by the government to have been one of the objects of the original conspiracy. The conviction was unwarranted because the government failed to prove an ingredient in addition to the wagering contract involved.

The trial court erred in refusing to grant judgments of acquittal, and the United States Court of Appeals erred in affirming the trial court in such ruling. The judgment of the United States Court of Appeals for the

Fifth Circuit should be reversed, and the trial court ordered to enter judgments of acquittal.

Respectfully submitted,

WESLEY R. ASINOF
Attorney for Petitioners
419 Atlanta National Bldg.
Atlanta, Georgia

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